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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS MARTINEZ,

Defendant and Appellant.

F055750

(Super. Ct. No. F06903310-1)

**OPINION**

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Thomas M. Singman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Wiseman, Acting P.J., Gomes, J., and Kane, J.

## ***PROCEDURAL HISTORY***

On February 22, 2008, pursuant to the terms of a negotiated plea agreement, appellant Jose Luis Martinez entered a plea of no contest to three counts of violating Penal Code[1] section 288, subdivision (a), a lewd act upon a child under the age of 14 (counts 1, as amended, 3 and 4). He also admitted that his offenses had been committed against more than one victim within the meaning of section 667.61, subdivision (b). In return for the plea, a number of other offenses and enhancement allegations, some more serious than those admitted, were dismissed. Those counts dismissed included kidnapping for purposes of molesting a child (counts 12 to 14); committing a forcible lewd act upon a child under 14 (count 1 prior to amendment); making criminal threats (count 2); and seven additional counts of violating section 288, subdivision (a) (counts 5 to 11). A number of enhancements, including bodily injury, multiple victims, substantial sexual contact, and substantial increase of risk by kidnapping, were also dismissed.

Martinez was sentenced on May 30, 2008. The court imposed three consecutive 15-year-to-life sentences. In addition, the court imposed a restitution fine in the amount of $10,000 and a parole revocation fine of $10,000. The parole revocation fine was suspended. The court also imposed a $300 fine pursuant to section 290.3 and imposed but then struck[2] a court security fee of $20. Martinez was also ordered to register as a sex offender pursuant to section 290.

The facts of Martinez's offenses are not relevant to the issue raised on appeal.

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[1] All further references are to the Penal Code.

[2] The clerk's minute order states that the $20 fine was suspended, but the reporter's transcript states that the fine was stricken.

## ***DISCUSSION***

Martinez raises a single issue on appeal: Should the $300 fine imposed pursuant to section 290.3[3] be stricken because it was not part of the negotiated plea disposition? Martinez argues that this case is controlled by the decision in *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*). We agree that *Walker* controls, but believes it compels affirmance rather than reversal.

The California Supreme Court in *Walker* set forth a two-prong approach to analyzing claims of plea bargain violations. (*Walker, supra*, 54 Cal.3d at p. 1024.) First, the question is whether the court properly advised the defendant concerning the plea consequences. A defendant must be admonished of and waive his constitutional rights (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122) and, additionally, must be advised of the direct consequences of the plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) Second, the question is whether the parties have adhered to the terms of the negotiated plea bargain. (*Walker, supra,* 54 Cal.3d at pp. 1019-1020.) When the state has induced a guilty plea pursuant to a plea bargain, it must keep its word and abide by the terms of the agreement. (*Id.* at p. 1024; accord, *People v. Knox* (2004) 123 Cal.App.4th 1453, 1459.)

An admission based on an uninformed waiver of rights as a result of the court's failure to fully advise a defendant concerning the consequences of an admission (in contrast to the failure to advise of a constitutional right), is set aside only if the error is prejudicial to the accused. (*Walker, supra,* 54 Cal.3d at pp. 1023-1024.) A showing of prejudice requires a demonstration that it is reasonably probable the defendant would not

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[3]Section 290.3 provides as follows: "(a) Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction …."

have entered his plea if he had been told about the fine. (*Id.* at p. 1024.) We conclude that Martinez suffered no prejudice by the failure to advise him that a mandatory $300 fine would be imposed pursuant to section 290.3. In determining prejudice, "[t]he court should consider the defendant's financial condition, the seriousness of the consequences of which the defendant *was* advised, the nature of the crimes charged, the punishment actually imposed, and the size of the restitution fine. [Citations.] The last of these factors is particularly important." (*Walker, supra*, 54 Cal.3d at p. 1023.) The written plea agreement signed by Martinez does not mention the section 290.3 fine,[4] nor did the court expressly advise Martinez that the fine would be imposed. However, the negotiated agreement here was extremely beneficial to Martinez. A number of offenses and enhancements were dismissed as a result of the agreement, many of which were more serious offenses and subjected Martinez to greater prison-time exposure. Martinez was advised and agreed to the two $10,000 fines and the parole revocation and victim restitution fines. It is highly unlikely that he would not have entered his plea had he known that an additional $300 fine would be imposed pursuant to section 290.3. If this were the end of our analysis, Martinez would not be entitled to relief because there is no prejudice.

There is a second question we must consider, however. The second prong of the analysis rests on the whether the section 290.3 fine is a significant part of the bargain agreed to by the parties. This prong is not subject to a harmless-error analysis. (*Walker, supra,* 54 Cal.3d. at p. 1026.) *Walker* explains the second-prong analysis as follows: "When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must

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[4]The probation report prepared for sentencing does include a recommendation that a section 290.3 fine be assessed unless the court determined that Martinez was unable to pay it, but of course this was prepared after Martinez has already entered his plea pursuant to an agreement that was silent on the issue of a section 290.3 fine.

abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon. [¶] '"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."' [Citation.]" (*Id.* at p. 1024.) If at sentencing the punishment imposed significantly differs from the terms of the plea agreement, defendant's silence does not waive a deviation from the terms of the plea agreement unless he has been advised of his right to set aside the plea agreement. (§ 1192.5; *Walker, supra,* 54 Cal.3d at pp. 1024-1025.) Martinez was not advised in accordance with section 1192.5, which advises a defendant that, if a punishment greater than that bargained for was imposed, he or she would be permitted to withdraw his plea. Therefore, Martinez cannot be said to have waived his right to challenge whether the punishment imposed complies with the terms of the plea agreement on appeal, even though he raised no objection at the trial court and did not seek to set aside his plea there. (*Walker supra,* at pp. 1029-1030.)

We must consider the merits of Martinez's claim that the state did not comply with the terms of the plea bargain. We find no error for two reasons. First, as the court in *Walker* noted, not every deviation from the terms of the plea agreement requires that the agreement be set aside. The variance must be significant in the context of the plea bargain as a whole. A punishment that is insignificant relative to the whole may be imposed even though it was not part of the express plea agreement without violating a defendant's rights or the spirit of the agreement. (*Walker, supra,* 54 Cal.3d at p. 1027, citing *Santobello v. New York* (1971) 404 U.S. 257, 262.) In *Walker,* the trial court imposed a $5,000 restitution fee that was not part of the plea bargain; the trial court had discretion to set the amount. The state Supreme Court found that the failure of the plea agreement to address the $5,000 restitution fine meant it was not part of the plea agreement and its imposition violated the terms of the agreement. It next considered what the appropriate remedy would be. Because the trial court was required in the

absence of exceptional circumstances to impose at least a $100 restitution fine, our state Supreme Court found that it could not simply strike the fine; without a restitution fine of at least $100 or a finding of exceptional circumstances, the sentence would be unauthorized. (*Walker, supra,* at p. 1027.) The *Walker* court thus concluded there were only two remedies available: either the matter must be sent back to allow the defendant the opportunity to withdraw his plea, something the court found to be contrary to the interests of justice, or the court could reduce the $5,000 fine imposed to the statutory minimum of $100. (*Ibid*.) The court found that this minimal fine, as opposed to the $5,000 fine imposed by the trial court, did not constitute significant deviation from the negotiated plea agreement. It therefore did not violate the rule that a sentencing court may not impose punishment significantly greater than that bargained for in the plea agreement. (*Ibid*.)

We also cannot strike the section 290.3 fine because it is required by statute, unless a court finds the defendant cannot pay it, which the trial court here did not do. We also cannot reduce the fine to $100, an amount the *Walker* court held as a matter of law was not a significant punishment, because $300 is the statutorily mandated amount of the fine. (*Walker, supra,* 54 Cal.3d at p. 1027.) We do not read *Walker*, however, as holding that only $100 fines may be deemed insignificant. The *Walker* analysis requires that we must still determine whether the $300 fine in the context of this plea agreement is a significant punishment greater than that contemplated by the plea agreement. We are mindful of the state Supreme Court's warning that appellate courts should not speculate why a defendant would negotiate a particular term or to assign our own value to any particular term. (*Id*. at p. 1026.) Nonetheless, we believe in this case that we can reach the same conclusion as did the court in *Walker*, finding that a $300 statutory fine, relative to the punishment imposed here, and considering the benefits to Martinez resulting from the plea agreement, is an insignificant addition to Martinez's punishment and does not constitute a significant deviation from the negotiated plea agreement. It does not deny

Martinez the benefit of his bargain. The court in *Walker* noted that the fine it was considering applied only to felonies. Individuals who admit a felony as part of a plea bargain generally do so "to avoid prison, reduce the maximum term, or have other charges dismissed." (*Walker, supra,* 54 Cal.3d at p. 1027.) "In the context of felony pleas, a $100 fine is not, as a matter of law, 'significant.'" (*Ibid.*) Likewise, a section 290.3 fine is imposed only in sex-offense cases. A person would plead guilty to a registerable sex offense only "to avoid prison, reduce the maximum term, or have other charges dismissed." (*Walker, supra,* at p. 1027.) We conclude in such cases that a $300 fine is not significant punishment and does not constitute a significant deviation from the terms of the plea agreement, particularly when the defendant has already agreed to a lengthy prison term, the larger restitution and parole revocation fines, and registration as a sex offender.

Furthermore, as pointed out in the decision in *People v. Crandell* (2007) 40 Cal.4th 1301, 1309, "the parties to a criminal prosecution are free, within such parameters as the Legislature may establish, to reach any agreement concerning the amount of restitution (whether by specifying the amount or by leaving it to the sentencing court's discretion) they find mutually agreeable." Section 290.3 does not reflect an intention by the Legislature to provide the parties to a criminal prosecution an opportunity for negotiation concerning the amount of the fine imposed. Section 290.3 imposes a mandatory fine. There can be no violation of the plea agreement where the fine in question was never one subject to negotiation. (See *In re Moser* (1993) 6 Cal.4th 342, 357 & *People v. McClellan* (1993) 6 Cal.4th 367, 379-380 [court found no violation of plea bargain occurred because additional burdens imposed on defendant were statutorily mandated].)

## ***DISPOSITION***

The judgment is affirmed.